91-1966

No.——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ANR FREIGHT SYSTEM, INC.,
Petitioner,

v.

FRANCIS L. PHILLIP,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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June 5, 1992

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QUESTION PRESENTED

Whether the court of appeals erred in holding that mere allegations in a handful of civil complaints that a defendant corporation and its independently managed former subsidiaries have committed prior acts of discrimination are sufficient, in a suit under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, to create an inference that the defendant acted with discriminatory intent.

PARTIES TO THE PROCEEDING

All of the parties are listed in the caption.

STATEMENT PURSUANT TO RULE 29.1

Petitioner ANR Freight System, Inc. is a wholly owned subsidiary of its parent company, The Coastal Corporation. Petitioner has no non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, ANR Freight System, Inc., hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 945 F.2d 1054 (1991); App., *infra*, 1a-5a. The district court did not issue a written opinion on the question presented. A transcript of the district court's oral order with respect to the question presented is attached at Appendix B; App., *infra*, 6a-15a.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1991, and rehearing was denied on February 5, 1992. On April 15, 1992, Justice Blackmun extended the

time for filing a petition for certiorari to and including June 6, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Age Discrimination in Employment Act of 1967 provides, in pertinent part, that:

> [i]t shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . .

29 U.S.C. § 623.

Rule 401 of the Federal Rules of Evidence states that:

> "[r]elevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed. R. Evid. 401.

Rule 802 of the Federal Rules of Evidence provides:

> [h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Fed. R. Evid. 802.

STATEMENT

1. Petitioner ANR Freight System, Inc. ("ANRFS") is a freight company with several thousand employees and operations nationwide. Prior to 1985, petitioner had three operating subsidiaries: (1) Graves Truck Line, Inc. ("GTL"), headquartered in Overland Park, Kansas; (2) Associated Truck Lines, Inc. ("ATL"), headquartered in Grand Rapids, Michigan; and (3) Garrett Freightlines, Inc. ("Garrett"), headquartered in Pocatello, Idaho.

These subsidiaries shared no common facilities, workforce, operational, managerial or executive personnel, and made independent decisions with respect to hiring, transfer, suspension, layoff, recall, promotion, discipline and discharge of their respective employees. In December 1985, GTL, ATL, and Garrett were merged into petitioner and their operations were consolidated.

Respondent Francis L. Phillip is a former employee of GTL and of petitioner. In November, 1986, respondent filed this age discrimination suit in the United States District Court for the Western District of Missouri. He alleged that in 1984, when he was 52 years old, he was demoted by GTL from the position of operations manager to the position of dock supervisor at GTL's Kansas City terminal in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.*

2. At trial, petitioner—the successor corporation to GTL—articulated several legitimate, nondiscriminatory reasons for Phillip's demotion, focusing primarily on his unwillingness or inability to accept and implement new procedures and management techniques adopted by GTL in 1984 to increase the Kansas City terminal's productivity and profitability. In response, Phillip sought to prove that GTL had in fact demoted him with discriminatory intent by introducing evidence of other *complaints* of age discrimination against GTL, ATL, and petitioner.

Specifically, Phillip sought to introduce copies of approximately seventeen civil complaints alleging violations of ADEA by employees of these companies.[1] The complaints had been filed in a number of different courts over a ten-year period extending from approximately five years prior to Phillip's demotion to five years after that date. Respondent introduced no evidence to place

[1] The exact number of complaints that Phillip attempted to introduce is uncertain. A written offer of proof lists 28 complaints, but Phillip produced copies of only 17 complaints, and the complaints listed in the written offer do not coincide precisely with the actual copies.

these written complaints in context. He did not, for example, offer to produce the complainants as live witnesses subject to cross-examination, nor did he offer a custodian for the records. Moreover, respondent offered no evidence that would demonstrate why complaints against petitioner or ATL would be probative of discrimination by GTL.

In addition, respondent offered no evidence providing a foundation for determining whether 17 complaints of discrimination over a ten-year period is statistically meaningful and, hence, relevant. He introduced no evidence, for example, of the overall number of individuals who were demoted or discharged by the petitioner or its former subsidiaries during this period of time. Nor did he introduce evidence of the total number of individuals employed by them during this period.

Petitioner objected to the introduction of these complaints on several grounds. First, it argued that the allegations—almost all of which were unadjudicated [2]—were clearly hearsay and thus inadmissible under Rule 802 of the Federal Rules of Evidence. App., *infra*, 12a. Second, petitioner contended that the allegations contained in these complaints were irrelevant—and thus inadmissible under Rule 402 of the Federal Rules of Evidence—both because mere accusations are not probative of actual conduct or intent and because the complaints did not relate to the individuals specifically responsible for respondent's demotion. *Id.*[3] Thus, even if

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[2] At least one of the complaints had been voluntarily withdrawn, *Martin* v. *Associated Truck Lines, Inc.*, 801 F.2d 246, 247-48 (6th Cir. 1986), and one ended in summary judgment in favor of petitioner, *Morgan* v. *ANR Freight Sys., Inc.*, 1989 U.S. Dist. LEXIS 1128 (D. Kan. Jan. 10, 1989), *aff'd*, No. 89-3017 (10th Cir.), *cert. denied*, 111 S. Ct. 514 (1990).

[3] As noted, ATL, one of petitioner's former subsidiaries named in many of these complaints, operated entirely independently of GTL, where respondent worked. *See supra* pp. 2-3. In addition, none of the complaints filed against petitioner after its consolidation in

the complaints were taken at face value as evidence of "prior discriminatory acts," they would not tend to make more probable the likelihood that *respondent's* supervisors acted with a discriminatory animus. Finally, petitioner argued that these complaints, because they contained no more than unproven allegations by individuals not proffered as live witnesses, were unduly prejudicial, and should be excluded under Rule 403 of the Federal Rules of Evidence. *Id.* at 12a-13a.

The trial court agreed with petitioner that the allegations in these complaints were not admissible as evidence of discriminatory intent, stating that "[j]ust because lawsuits are filed doesn't give credibility to them." *Id.* at 14a. The court also stated that "I don't think they are admissible under [Rule] 403 [which authorizes the court to bar relevant evidence if it is unduly prejudicial] and I certainly don't think allegations . . . are admissible under [the] business records [exception to the hearsay rule]." *Id.* The jury returned a verdict in favor of petitioner.

3. On appeal, the court of appeals held that the district court erred in excluding these complaints. Without analyzing the nature of the complaints—*i.e.*, whether they were hearsay, irrelevant or unduly prejudicial—the court of appeals stated that the complaints should have been admitted because of their potential impact on the jury's assessment of GTL's motive. According to the court, "[t]he admission of such 'background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive.'" App., *infra*, 5a (*quoting Estes* v. *Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988)).[4] Accordingly, it reversed and remanded the case

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1985 concerned individuals at the Kansas City terminal where respondent worked.

[4] In the *Estes* case, as in the decision below, the Eighth Circuit reversed the district court's decision to bar evidence of a very small number of prior bad acts of discrimination, holding, in essence, that

for a new trial in which all of these complaints could be introduced.

REASONS FOR GRANTING THE PETITION

In overturning a jury verdict for a defendant solely on the basis of a small number of unadjudicated civil complaints, the Eighth Circuit has decided an issue of central importance to age discrimination cases in a way that is entirely inconsistent with previous holdings of this Court and several of the courts of appeals. Because of the importance of the issue presented, and because there is a conflict among the circuits on how it should be resolved, this petition presents a question which warrants resolution by this Court.

1. Under the well-established *McDonnell Douglas* standard, if a plaintiff in an age discrimination case establishes a prima facie case of discrimination, the burden shifts to the defendant to produce evidence of a legitimate business rationale for the challenged employment action.[5] See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-03 (1973) (Title VII); see also *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 186 (1989) (Section 1981); *White* v. *Westinghouse Elec. Co.*, 862 F.2d 56, 59-60 (3d Cir. 1988); *cf. Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985). If the defendant comes forward with a legitimate, non-discriminatory basis for the action, plaintiff has the opportunity to demonstrate that the defendant's non-discriminatory rationale is pretextual.

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a sample need not be statistically meaningful to be relevant. 856 F.2d at 1104.

[5] The burden of establishing a prima facie case is "not onerous." *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981). In an age discrimination case, a plaintiff establishes a prima facie case by showing that he was a member of the protected class, that he was treated adversely by his employer, that he was qualified for the position in which he was employed, and that he was replaced by a younger person. *See, e.g., Moody* v. *Pepsi-Cola Metro. Bottling Co.*, 915 F.2d 201, 208 (6th Cir. 1990).

Texas Dep't of Community Affairs v. *Burdine*, 450 U.S. 248, 253 (1981).

Because a prima facie case is readily established for most claims of individualized employment discrimination, and because defendants can generally articulate a nondiscriminatory rationale for their action, "the great majority of [age discrimination] cases turn on the plaintiff's ability to demonstrate that the nondiscriminatory reason offered by the employer was a pretext for discrimination." B. Schlei & P. Grossman, *Employment Discrimination Law* 1317 (2d ed. 1983). To demonstrate that the employer's justification is pretextual, a plaintiff may point to statistical evidence of a pattern of intentionally discriminatory practices by the employer. See *McDonnell Douglas*, 411 U.S. at 804-05. By itself, however, such statistical evidence is not dispositive in a claim of individualized discrimination. *Id.* at 805 n.19.

While the *McDonnell Douglas* procedure is designed to ease the burden on plaintiffs, who often must prove discriminatory intent in circumstances where direct evidence is unavailable, this Court and other federal courts consistently have cautioned that indirect, or circumstantial, evidence of discriminatory intent is admissible only where such evidence is "reliable and presented in a relevant framework and the sample [is] sufficiently large." B. Schlei & P. Grossman, *Employment Discrimination Law* 196 (2d ed. cum. supp. 1989). See also *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 340 (1977); *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 620-21 (1974); *Schrand* v. *Federal Pac. Elec. Co.*, 851 F.2d 152, 156 (6th Cir. 1988); *Goff* v. *Continental Oil Co.*, 678 F.2d 593, 596-97 (5th Cir. 1982). The Eighth Circuit failed to heed this admonition and has established a precedent that, if left undisturbed, will upset the carefully balanced evidentiary scheme that governs age discrimination cases. Virtually all corporations in the United States with more than a minimal number of employees are named in such suits routinely. Permitting plaintiffs to introduce the types of allegations at

issue in this case will thus impose an entirely unwarranted burden on companies such as petitioner nationwide.

2. The Eighth Circuit's holding that a plaintiff in employment discrimination litigation may introduce a relatively small number of unsupported allegations of discrimination on the part of corporate actors who are not the persons specifically responsible for the adverse action against the plaintiff conflicts with decisions of this Court and other courts of appeals. Those courts have held that such evidence is not relevant to the issue of discriminatory intent.[6]

a. The Eighth Circuit's holding squarely conflicts with the decisions of numerous courts of appeals holding that evidence of other discriminatory acts by an employer is relevant *only* if it concerns those individuals responsible for the alleged discrimination against the plaintiff. In *Goff*, 678 F.2d 593, for example, the Fifth Circuit affirmed the trial court's decision prohibiting testimony by former employees of a company who had not worked in the plaintiff's division and could not testify specifically about discrimination against the plaintiff. The court stated that

> [Plaintiff] Goff's claim was one of individualized . . . discrimination. To prevail, he had to show that Conoco purposefully discriminated against *him*. . . . None of [the witnesses] had worked with Goff at Conoco, and none had any knowledge of Goff's experience or relationship with the company. . . . Because none had worked in Goff's department, their testimony would not have concerned the same supervisors of whom Goff complained.

Id. at 596-97 (emphasis in original). Thus, the Fifth Circuit concluded that "this testimony would not have

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[6] At least one circuit has held that such evidence should also be excluded as unduly prejudicial. *See Schrand* v. *Federal Pac. Elec. Co.*, 851 F.2d 152, 156 (6th Cir. 1988). *See also Yellow Bayou Plantaton, Inc.* v. *Shell Chem., Inc.*, 491 F.2d 1239, 1242-43 (5th Cir. 1974) (civil complaints inadmissible in tort suit even to prove notice because unduly prejudicial).

related to the issue of whether Goff suffered discrimination, [and] the [trial] court did not err in refusing to admit this testimony." *Id.* at 597.

In *Schrand*, 851 F.2d 152, the Sixth Circuit reversed a district court's decision to allow two former employees of the defendant to testify that they had been terminated for age-related reasons. According to the Sixth Circuit, "there was no evidence from which the alleged statements of the witnesses could logically or reasonably be tied to the decision to terminate [the plaintiff]." *Id.* at 156. "The fact that two employees of a national concern, working in places far from the plaintiff's place of employment, under different supervisors, were allegedly told they were being terminated because they were too old, is simply not relevant" to the question of whether the defendant discriminated against this plaintiff. *Id.* See also *Fortino* v. *Quasar Co.*, 950 F.2d 389, 395 (7th Cir. 1991) ("'[A]ctions and comments by employees not involved in a discharge decision cannot provide a basis for charging other employees [in a management position] with discrimination'") (internal citation omitted); *Mauter* v. *Hardy Corp.*, 825 F.2d 1554, 1558 (11th Cir. 1987) (statement by an individual who played no part in the decision to terminate the plaintiff "is too attenuated to present a genuine issue of material fact as to [the defendant's] discriminatory intent"); B. Schlei & P. Grossman at 1316 (2d ed. 1983) ("[t]he usefulness of statistics will depend primarily upon their relevance to the specific decision affecting the individual plaintiff, rather than those that affect plaintiffs' protected class in general").

b. The Eighth Circuit's holding also conflicts with the decisions of this Court that evidence of a pattern of discrimination is relevant—and hence admissible—only if it is statistically meaningful. This Court has been particularly wary of drawing an inference of discrimination from small samples. In *Mayor of Philadelphia*, 415 U.S. at 620-21, for example, this Court rejected a statistics-based challenge to the racial composition of a mayoral board with two black and eleven white members. It

labeled the challengers' statistical comparisons to the population at large "simplistic" and expressed concern over the "smallness" of the statistical sample. Similarly, in *International Bhd. of Teamsters*, 431 U.S. at 340, the Court cautioned that the "usefulness of [statistical evidence] depends on all of the surrounding facts and circumstances." In that case, it recognized that, although statistical disparities may raise an inference of discrimination, "[c]onsiderations such as small sample size may, of course, detract from the value of such evidence." *Id.* at 340 n.20. See also *Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 311 n.17, 312 (1977) (remanding discrimination case based on statistical evidence for evaluation in light of " 'all of the surrounding facts and circumstances' " (quoting *Teamsters*, 431 U.S. at 340)); *McDonnell Douglas*, 411 U.S. at 805 (referring to "competent" statistical evidence).

Following this Court's lead, several courts of appeals have held that an inference of discrimination cannot be drawn from a numerical disparity in a small sample, especially where, as in this case, the plaintiff has not provided a context in which to evaluate the sample. In particular, the Sixth Circuit has held that evidence of the departure of 17 older individuals from a workforce, introduced to rebut an employer's business justification, had "insufficient probative value to support a jury verdict on the ultimate question of discrimination." *Simpson* v. *Midland-Ross Corp.*, 823 F.2d 937, 943 (6th Cir. 1987). The court reasoned that "[n]ot only is reliance on such a small sample suspect . . . [but] we have no idea whether seventeen people constituted a significant percentage of [the defendant's] workforce . . . ." *Id.* (citation omitted).

The Second Circuit similarly has held that it was error in an employment discrimination case to admit testimony of six former employees concerning the circumstances of their termination, stating that "[f]or such statistical evidence to be probative . . . the sample must be large enough to permit an inference that age was a determina-

tive factor in the employer's decision." *Haskell* v. *Kaman Corp.*, 743 F.2d 113, 121 (2d Cir. 1984). This requirement that evidence of "other acts" of discrimination be statistically significant in order to be relevant, has been widely followed in the other circuits. See *Pace* v. *Southern Ry. Sys.*, 701 F.2d 1383, 1388-89 (11th Cir.) ("appellant has failed to place [evidence of six allegedly discriminatory promotions] in a relevant context"), *cert. denied*, 464 U.S. 1018 (1983); *EEOC* v. *American Nat'l Bank*, 652 F.2d 1176, 1193 (4th Cir. 1981) ("Samples too small are suspect as a basis upon which to infer any pattern of discrimination in making employment decisions"), *cert. denied*, 459 U.S. 923 (1982); *Turner* v. *Texas Instruments, Inc.*, 555 F.2d 1251, 1257 (5th Cir. 1977) ("sample upon which the trial court relied was far too small even to be statistically significant, much less sufficiently clear to have probative significance").[7] The Eighth Circuit's holding that mere complaints of discrimination are *per se* admissible as "background"—regardless of any showing of relevance—squarely conflicts with these decisions.[8]

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[7] At least two courts of appeals also have held that allegations of discrimination are not relevant if, as in this case, they are made over an extended period of time. In *Haskell* v. *Kaman Corp.*, 743 F.2d 113, 121 (2d Cir. 1984), the Second Circuit concluded that evidence of acts that occurred over an eleven-year period was not statistically meaningful. And the Fourth Circuit, in *Herold* v. *Hajoca*, 864 F.2d 317, 321-22 (4th Cir. 1988), *cert. denied*, 490 U.S. 1107 (1989), concluded that there was no error in excluding evidence of discriminatory acts allegedly committed more than 18 months before or after the plaintiff's termination.

[8] In many respects, evidence of a relatively small number of unrelated claims of discrimination is no different than evidence of "stray remarks." This Court and many of the courts of appeals consistently have rejected such remarks as relevant evidence of discriminatory intent. *See, e.g., Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 251 (1989); *id.* at 277 (O'Connor, J. concurring); *Merrick* v. *Farmers Ins. Group*, 892 F.2d 1434, 1438 (9th Cir. 1990) ("'stray' remarks are insufficient to establish discrimination"); *Goff* v. *Continental Oil Co.*, 678 F.2d 593, 597 (5th Cir. 1982) ("[i]n order to

3. The Eighth Circuit's decision also conflicts with the decisions of several courts of appeals that have held that civil complaints are inherently unreliable evidence of the truth of the matter asserted therein, and that such complaints therefore are inadmissible under the hearsay rule.[9] In *Soden* v. *Freightliner Corp.*, 714 F.2d 498, 509 (5th Cir. 1983), for example, the Fifth Circuit held, in the context of a products liability case, that civil complaints were not admissible to prove that the product was *in fact* defective because such complaints are "hearsay, unsworn, and self-serving." *Id.* at 509.

Likewise, in *Broome* v. *Dazey Corp.*, 1989 U.S. App. LEXIS 14335, at *9 (6th Cir. 1989), the Sixth Circuit upheld the trial court's decision to limit the use of allegations in complaints to proof of "notice," stating that "[a]llegations in an out-of-court complaint are hearsay not subject to cross-examination and therefore not admissible for the truth of the matters asserted." See also

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establish the existence of a pattern or practice, [the plaintiff] would have had to show 'more than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts' ") (quoting *Teamsters*, 431 U.S. at 336).

[9] The complaints in this case were not offered to prove any sort of notice on the part of petitioner or to impeach one of its witnesses. Thus, the allegations contained in these complaints have absolutely no evidentiary value unless they are true. If the complaints were admitted for the truth of the allegations contained therein, such use squarely conflicts with what this Court has identified as the policies underlying the hearsay rule, which are to:

> (1) insure[] that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) force[] the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; [and] (3) permit[] the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

California v. *Green*, 399 U.S. 149, 158 (1970) (footnote omitted).

Wilson v. *Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir.) (evidence of other lawsuits admissible only on issue of notice, not to prove underlying conduct), *cert. dismissed*, 454 U.S. 1130 (1981); *Marx & Co.* v. *Diner's Club, Inc.*, 550 F.2d 505, 513-14 (2d Cir.) (upholding trial court's decision to exclude an unsworn complaint filed in earlier litigation "[s]ince it was unauthenticated hearsay"), *cert. denied*, 434 U.S. 861 (1977).

* * * *

In sum, the Eighth Circuit, by permitting unsworn complaints against individuals and companies unrelated to those responsible for the plaintiff's demotion to provide a "background" for a jury in an age discrimination suit, has established a new rule with respect to the admissibility of allegations of prior discriminatory acts in cases under the Age Discrimination in Employment Act. This rule conflicts with decisions of this Court and several courts of appeals holding that evidence of prior bad acts is inadmissible to prove a pattern of discrimination unless the "pattern" is statistically meaningful. It also conflicts with decisions of several circuits holding that such evidence is inadmissible unless it has some direct nexus to the individuals responsible for the alleged discrimination at issue. Finally, it conflicts with the decisions of several circuits holding that allegations in civil complaints are inadmissible hearsay when introduced to prove the truth of the matter asserted therein. Because the Eighth Circuit's rule squarely conflicts with the decisions of these courts, and because this rule threatens the balance inherent in the *McDonnell Douglas* "shifting burdens" framework to the manifest prejudice of defendants, this case presents an issue that is worthy of review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted. Because of the inconsistency between the ruling below and this Court's decisions in *Mayor of Philadelphia* and *Teamsters*, the Court may wish to consider reversing the judgment summarily.

Respectfully submitted,

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June 5, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 90-2756

FRANCIS L. PHILLIP,
Appellant,

v.

ANR FREIGHT SYSTEMS, INC.,
Appellee.

Submitted June 13, 1991
Decided Oct. 4, 1991

Karen K. Howard, Kansas City, Mo., for appellant.

R. Kent Sellers, argued (John J. Yates, on brief), Kansas City, Mo., for appellee.

Before JOHN R. GIBSON and LOKEN, Circuit Judges, and ROSS, Senior Circuit Judge.

ROSS, Senior Circuit Judge.

Francis L. Phillip (Phillip) was born July 22, 1932. Phillip, an employee of ANR Freight Systems, Inc. (ANR), has held many positions within ANR and its predecessor company. On November 25, 1984, Phillip was demoted from operations manager to dock supervisor. Phillip's demotion resulted in a $78.00 per week salary reduction (a yearly reduction of approximately $4,000). Phillip brought this age discrimination suit against ANR, claiming that he was demoted because of his age.

Following a five-day trial, the jury returned a verdict for ANR. Phillip's motion for new trial was denied and this appeal followed.

Phillip raises three issues on appeal. First, he argues that the district court judge should have recused himself. Second, Phillip argues that the court erred in excluding certain evidence regarding statements made by ANR supervisors and evidence concerning other discrimination cases filed against ANR. Third, Phillip contends that certain jury instructions were erroneous.

A. Recusal

On the third day of trial, Phillip made an offer of proof concerning evidence of discrimination complaints against ANR. At the close of the offer, the court made the following comment:

> All right. I am not going to let them in, unproven allegations. Just because lawsuits are filed doesn't give credibility to them, especially in these cases. Those are Title VII cases. Congress has created a nightmare because they entice anybody and everybody to file those things and entice any attorney to file them in the mere chance that if they win a dollar they can win attorney fees. So I think any Title VII cases ought to be looked at with suspicion to begin with because it's a crap shoot, which everybody engages in. So I am going to deny it. . . .

The above comment was not made in the presence of the jury. After the court made the comment, Phillip's counsel made an oral motion for recusal and mistrial because of the comment. A hearing was held in chambers and the motion was denied.

Under 28 U.S.C. § 455(a), a judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194,

100 L.Ed.2d 855 (1988); *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1329-30 (8th Cir.1985). However, we note that the judge's impartiality is presumed and Phillip "bears the substantial burden of proving otherwise." *United States v. Walker*, 920 F.2d 513, 517 (8th Cir.1990); (quoting *Ouachita Nat'l Bank v. Tosco Corp.*, 686 F.2d 1291, 1300 (8th Cir.1982)). Furthermore, a district court judge's decision to recuse is reviewable only for an abuse of discretion. *Walker*, *supra*, 920 F.2d at 517.

Here, the district court judge voiced his feelings about Title VII, but recusal is not required where "the judge has definite views as to the law of a particular case." *Moore v. McGraw Edison Co.*, 804 F.2d 1026, 1032 (8th Cir.1986). Furthermore, "a motion for disqualification ordinarily may not be predicated on the judge's rulings in the instant case or in related cases, nor on a demonstrated tendency to rule any particular way, nor on a particular judicial leaning or attitude derived from his experience on the bench." *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1020 (5th Cir. 1981), *cert. denied*, 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982) (district court judge's failure to recuse himself based on his "unseemly" racial comments in a racial discrimination case was not an abuse of discretion where plaintiff's affidavit did not state any facts relating to any bias of the plaintiffs or defendants in the case.) The comment of the district court was not directed toward the merits of Phillip's claim, nor did it relate to any bias toward Phillip or ANR.

Although Phillip has requested the district court judge's recusal, we do not find recusal to be necessary here because "a few improper comments do not merit reversal." *Walker*, *supra*, 920 F.2d at 517 (citing *Hale*, *supra*, 756 F.2d at 1330). We note that the district court judge is an experienced trial judge and we assume that he will refrain from making such comments when this case is retried.

B. Evidentiary Rulings

At trial, Phillip made several offers of proof of evidence which he believed to be probative of his ADEA claim. These proof offers included evidence of other age discrimination lawsuits filed against ANR. The district court found that Phillip had failed to show that the cases were sufficiently similar to his own case and therefore the evidence was excluded on the grounds that it was irrelevant and unduly prejudicial. In light of our recent decision in *Hawkins v. Hennepin Technical Center*, 900 F.2d 153, 154 (8th Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 150, 112 L.Ed.2d 116 (1990), we must disagree with the district court's exclusion of this important evidence.

In *Hawkins*, this court reversed and remanded an employee's gender discrimination and retaliatory discharge suit against her employer because the district court excluded, on relevancy grounds, evidence of alleged acts of sexual harassment committed against the plaintiff and other employees. We held that "the evidentiary exclusions were erroneous and deprived [plaintiff] of a full opportunity to present her case to the jury." *Id.* at 154. We explained that "[b]ecause an employer's past discriminatory policy and practice may well illustrate that the employer's asserted reasons for disparate treatment are a pretext for intentional discrimination, this evidence should normally be freely admitted at trial." *Id.* at 155-56.

In an earlier case, *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097 (8th Cir.1988), we similarly reversed and remanded a suit by an employee alleging age and race discrimination where the district court excluded, on relevancy grounds, "evidence which tended to show a climate of race and age bias at [defendant's company]." *Id.* at 1102. We noted that an employer's background of discrimination is indeed relevant to proving a particular instance of discrimination. *Id.* at 1103.

We find the reasoning in these two cases to be compelling to our resolution of the instant case. Here, as in *Walker* and *Estes*, the admission of such "background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive." *Estes*, *supra*, 856 F.2d at 1103. Accordingly, we reverse the decision of the district court to exclude this evidence and remand the case for a new trial.

Phillip also argues that the district court improperly excluded testimony from an ANR employee, Dan Robertson, regarding statements made by ANR supervisors about Phillip and older employees. The district court excluded the evidence, finding that its admission would result in unfair surprise in contravention of Fed.R.Civ.P. 26(e)(2) because ANR first learned of the damaging statements at the time the offer of proof was made. Based on our preceding decision to reverse and remand the case for a new trial, there is no need for us to rule on this issue, as Phillip will have an opportunity to offer this testimony at the second trial without any surprise taint. We note, however, that absent the factor of surprise, Robertson's testimony would have been admissible at the first trial.

C. Jury Instructions

Lastly, Phillip argues that the jury instructions did not state the applicable standards of law as to the use of the *McDonnell Douglas* burden shifting test and that he was thereby prejudiced. The fact that the district court did not employ the exact *McDonnell Douglas* language does not make the instructions fatal. We have reviewed the jury instructions and find that the instructions, read as a whole and considered in light of the entire charge, state the governing law fairly and correctly.

For the foregoing reasons, we reverse and remand this case for a new trial.

APPENDIX B

[412]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 86-1258-CV-W-1

FRANCIS L. PHILIPP,
Plaintiff,

vs.

ANR FREIGHT SYSTEM, INC.,
Defendant.

TRANSCRIPT ON APPEAL
Volume III

On Wednesday, February 28, 1990, the above-entitled cause came on for trial before the HONORABLE DEAN WHIPPLE, UNITED STATES DISTRICT JUDGE, and a jury sitting in Division No. 1, Kansas City, Missouri.

APPEARANCES

FOR THE PLAINTIFF:

Ms. Karen K. Howard
Ms. Gwen Caranchini
Corporate Woods North
851 N.W. 45th Street, Suite 306
Kansas City, Missouri 64116

FOR THE DEFENDANT:

Mr. John J. Yates
Ms. Marietta Parker
Gage & Tucker
2345 Grand Avenue
Kansas City, Missouri 64141

* * * *

[415]

Morning Session, Wednesday, February 28, 1990

(The following proceedings were held in the courtroom outside of the hearing of the jury.)

THE COURT: All right, I understand that you want to make your offer of proof on the other incidents that are tied to the production of documents of the other cases. Is that what we are talking about?

MS. CARANCHINI: Yes.

THE COURT: Let the record show we are having a conference in the courtroom, the jury has not been called in yet this morning. Okay. What do we have?

MS. HOWARD: Your Honor, I would like to make an offer of proof that there are numerous lawsuits against ANR Freight Systems, in fact, we have the complaints of 28 plaintiffs. These plaintiffs are very similar in circumstance to Mr. Phillip, and I would like to go through each one, if I could.

THE COURT: Okay.

Now, wait a minute, are any of them reduced to a judgment?

MR. YATES: One that I am aware of.

MS. HOWARD: I don't know, Your Honor.

THE COURT: Now how, in other words, lawsuits pending, the evidentiary issues have not been resolved, so why would they be admissible, tell me that before I let you make [416] an extended offer of proof. Other than that, you can make it—I am not going to let you recite through 28 cases, you can do that by a written offer of proof. Why would that be admissible when they are pending cases? That's like saying you can list arrest records, we outlawed that years ago, because an arrest does not make it guilty. And a lawsuit does not make it guilty.

Now, tell me how it is admissible.

MS. HOWARD: Your Honor, numerous circuits and the Supreme Court has held that the plaintiff can demonstrate a inference of discrimination in whatever manner is appropriate in a particular case and I quote Dias vs.

American Telephone and Telegraph, 752 F.2d, 1356, page 1361.

The Eighth Circuit has recognized that admission of discriminatory intent is unlikely and that to find discriminatory intent you have to do a sensitive inquiry into such circumstantial and direct evidence as intent that may be available. And I cite for that principle Williams vs. Anderson, 562 F.2d 1081.

United States Supreme Court in United Airlines, Inc. vs. Evans has mentioned that the subjects from which discriminatory intent may be inferred, including but not limited to, a prior history of discriminatory acts.

In the Williams case, the Court cited "Proof that the defendants engaged in discriminatory practices and policies [417] prior to the period of time for which relief is available is relevant since it creates the inference that the discrimination continued."

In suits like this one, evidence of proof is only circumstantial. We have alleged pattern and practice, and evidence of general patterns of discrimination by an employer is clearly relevant. And I also cite United States Supreme Court case Bazemore vs. Friday, and that's 431 United States—excuse me, 478 United States 385, a 1986 case.

Eighth Circuit case Hogan vs. American Telephone and Telegraph is also in accord with this. And the Courts have permitted the testimony of other complaints in other age cases. For example, in Harpring, which is a Fifth Circuit case, the Court stated it's clear that the testimony of similarly situated employees and the reasons for their discharge are relevant in proving a pattern and practice of discrimination.

In Hogan vs. American Telephone and Telegraph they cited Federal Rule of Evidence 404(b), that evidence of prior acts of past discrimination are relevant to prove intent or motive in the actions toward the plaintiff.

And in another case, Kneisley, it's a District Court of Delaware 1983, the Court held that a plaintiff in an age

case could introduce testimony of co-workers who also were the subject to defendant's discriminatory reduction in force plan.

[418] Now, there is a case that comes out of the Federal Rules of Evidence service, it's not an age case, it's a fraud case and a misrepresentation case. The plaintiff in this case attempted, wanted to introduce copies of 75 fraud complaints. Now, there weren't any rulings on those complaints and there was no evidence yet as to what the status was of all of those cases, just like here. And the Court permitted that—the Court permitted the plaintiff to introduce copies of the complaints against the company for the limited purpose of establishing knowledge and wanton and reckless conduct on the part of the defendant. But they limited the evidence just that you cannot talk about the outcome of the cases.

In the Tenth Circuit there is a case called Bradbury vs. Phillips Petroleum Co., and that's cited at 815 F.2d, 1357 1987. The Court permitted evidence of seven other complaints against the defendant under Federal Rule of Evidence 404(b).

Not only do we rely on Federal Rule of Evidence 404(b), we also rely on Federal Rule of Evidence 803.6 and 803.8. Federal Rule 803.8 deals with public records. Many of these copies were certified copies which I received from the different courts. Federal Rule 803.6 deals with business records produced by the corporation. The corporation produced some of these documents. We also—

THE COURT: They let them in as business records. That's a new one. Go ahead.

[419] MS. HOWARD: We also want to question Mr. Howe about these suits. Mr. Howe is sitting here as the corporate representative. We understand that he has some knowledge of some of these lawsuits and we would like to use it for the purposes of impeachment.

THE COURT: Impeachment?

MS. HOWARD: Yes.

MS. CARANCHINI: Explain to the Court how you want to use the impeachment.

MS. HOWARD: This company has stated in interrogatory answer to me—I asked them three years ago how many other complaints of age discrimination are there against ANR Freight Systems or defendant. They stated Francis Phillip, Harry Morgan and a Texas case. They did not do any of these other cases. The only way I found out about these cases was in one deposition, one gentleman mentioned in hearsay, I think there was a case in Ohio, which made me think I will contact the federal court and ask. And I wrote inquiries to several of these courts and that's how I found out about some of these other cases, that the defendant lied.

MS. CARANCHINI: There is no indication, Your Honor, we want to make it clear, there is no inference that counsel knew of that.

MS. HOWARD: No. It was signed by Bullock, the interrogatories.

[420] THE COURT: And all of these petitions are, the 28 cases are age discrimination?

MS. HOWARD: They are all age discrimination. They all involve white men except one. They are all men in their 50s and their 60s and they are all managerial employees except three, I believe—except for two of them. And for example, one is a regional safety manager. One is a vice-president of operations. One is a district line hauler. One is an assistant terminal manager. One is a terminal manager. One is a terminal manager. One is a sales representative. One is a maintenance manager. One is a manager of purchasing and maintenance. One is a general manager of special products. One is a president of road equipment. One is a salesman. Three are salesmen. One is a mechanic. I mean they are not hourly drivers, which would be thousands of employees. These are all mid-level management employees. The lawsuits range from 1980 through just this past summer 1989.

We also have some EEOC complaints, and I don't know if those, I don't know, I don't have any case law on whether or not those are relevant to introduce. But we

have gentlemen, two gentlemen over in St. Louis who have filed age claims in the past three years against ANR Freight Systems. And we know of a gentleman over in Salt Lake City who was demoted and then terminated. And he has not yet filed a lawsuit yet. But the EEOC complaint—Excuse me, the company's position for his [421] demotion in Utah is that he lacks people's skills. That is the very same defense that they have used in Mr. Phillip's case which you have not heard about yet, that Mr. Phillip lacks people skills.

THE COURT: All right. Let's see what the defendant's position is?

Yes, Mr. Yates.

MR. YATES: Thank you, Your Honor.

In response to the Court's earlier inquiry, there are two cases, to my knowledge, that have gone to judgment. I don't know, not knowing which of the 28 cases are being proffered here, I can't respond to each directly. The first case and one which I was involved in with Ms. Howard is the Harry Morgan vs. ANR-Graves Truck Line case, filed in the District Court for the District of Kansas. A summary judgment was entered in favor of the defendant and against the plaintiff on the age claim.

That matter is now before the Tenth Circuit Court of Appeals for argument next Tuesday, I believe. There was one other case I believe taken, I am not sure if the defendant there was ANR Freight or Associated Truck Lines, but one case other than the case here has gone to trial. And in that case there was a judgment that was rendered in favor of the defendant and against the plaintiff. So those are the only two cases in which there has been an adjudication; and in both [422] instances that adjudication has been contrary to the plaintiff's position.

These complaints are nothing more than allegations. Anybody with $65 or depending on when, I think it's $105 now, can walk into a federal court and make the grossest allegations of misconduct. Until those allegations of misconduct have been proved to be true they have no proba-

tive evidence whatsoever in this case or any other case. There are no more than arrest records.

The prejudicial effect of putting in 28 complaints unfounded, unproven allegations of age discrimination is absurd and should not be permitted. Secondly, there is not another case out of this terminal involving the same decision makers that were involved in the decision involving this plaintiff, even if we got past the threshold issue, these not moving to adjudication, but merely being accusations.

The case that she refers to in Utah is at the charge level. Now, if we want to bring in EEOC charges, I am sure that we can run that 28 up to 56 or a 100, or whatever. That is every company doing business in the United States today, including the United States Government, is subject to claims of employment discrimination of one type or another. Until those claims are proven to have some merit they are not admissible.

The plaintiff also ignores a very important issue, even [423] if there was some probative to these, and I think that is the issue of hearsay. Each and every one of these complaints contains hearsay. There is not a proffer of a witness to come forward and testify. As in one of the cases she cited, that there was a similar situated individual who complained to have suffered comparable discrimination from a comparable source, such as if there was another dock supervisor or someone like that who had been mistreated by Mr. Emahiser or Mr. Ainsworth or someone like that, and we could have a common nucleus of facts, that might—and I won't concede it—that might be probative of the issue. That's what the Hogan and other cases refer to.

You know, what the plaintiff is attempting to do here very clearly is establish that we have violated the law by our prior bad acts, and the Federal Rules of Evidence precludes that kind of the evidence, that 403 precludes that kind of evidence, the prior bad acts coming into play, even if they could have been demonstrated. If there

is any probative whatsoever, and I don't agree that there is probative here to any issue, then the prejudice that comes to the defendant to have that many cases of allegations, unfounded allegations or certainly unproven allegations of discrimination, would constitute a great miscarriage of justice. It would be extraordinarily prejudicial. And I don't think the employer or defendant in this case could adequately respond to that [424] kind of thing.

And again, I mean, I haven't seen the 28 cases that are being proffered, I don't know what cases they are going to be. But if we can get through these structural questions, I would be willing to wager that individuals in St. Louis, Salt Lake City, Utah, who work for another affiliated company, if some of these are ATL or GTL, I am sorry, ATL being Associated and GTL being Garrett Motor Freight were involved. I just don't think we will ever get a sufficient similarity of circumstance.

THE COURT: Further response?

MS. HOWARD: Yes, Your Honor.

This evidence that I want to present is an exception to the hearsay rule. It's under 803.6 for that provision. It also goes under 404(b). I cited numerous case law in support of these complaints being introduced.

Defendants cited no case law against in their favor. We would not object to them on cross-examination showing that, the two cases in their favor. Mr. Morgan's case, which, yes, I do represent him. It's on the 10th Circuit Court of Appeals, and the AARP has entered its appearance as amicus curiae.

THE COURT: Who has?

MS. CARANCHINI: The American Association of Retired Persons has entered its appearance in this case.

[425] THE COURT: I didn't know they were getting into that then.

MR. YATES: A great deal.

MS. CARANCHINI: Thank goodness.

THE COURT: Thank goodness. It sounds to me like they are abusing the members dues.

MS. HOWARD: Mr. Yates was incorrect as to the statement about Mr. Morgan's case, that the same people did not make the decision. Mr. Emahiser will be called as a witness here, that he was involved in the decision to demote Mr. Philipp, and in Mr. Morgan's case Mr. Emahiser made that decision too.

THE COURT: All right. I am not going to let them in, unproven allegations. Just because lawsuits are filed doesn't give credibility to them, especially in these cases. Those are Title VII cases. Congress has created a nightmare because they entice anybody and everybody to file those things and entice any attorney to file them in the mere chance that if they win a dollar they can win attorney fees. So I think any Title VII cases ought to be looked at with suspicion to begin with because it's a crap shoot, which everybody engages in. So I am going to deny it. I don't think they are admissible under 403, and I certainly don't think allegations in the petition are admissible under business records.

Ms. Howard, I would direct in your offer of proof, have [426] your secretary type up a list of all of those cases, and submit it that way. I don't want to take time for you to dictate it into the record. It would be just as easy supplied by typing it in.

MS. HOWARD: Yes, Your Honor.

THE COURT: Now, do we have anything else to resolve before we begin?

MS. HOWARD: Yes.

Yesterday, I indicated that I wanted to call Nancy Wallace as a witness, and Mrs. Parker indicated that she was so busy, she was getting ready to quit, that she didn't have time to interview witnesses. So if she wanted to take a few minutes, we would not object to that, to interview her. She's sitting out there, if she wanted to interview her that would be all right.

MS. PARKER: I don't need to interview her unless she is going to be coming out now with one of these surprise statements about, you know, something somebody

said that's out of the blue. Is there going to be one of those?

MS. HOWARD: I am not aware of it but you never know what comes out on the stand.

MS. PARKER: Are you going to ask her?

MS. HOWARD: I am going to ask her questions about age, yes, but she has not indicated to me any specific statements.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2756WMKC

FRANCIS L. PHILLIP,
Appellant,

v.

ANR FREIGHT SYSTEMS, INC.,
Appellee.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judge Beam voted to grant en banc consideration limited to the evidentiary issue.

Rehearing by the panel is also denied.

February 5, 1992

Order Entered at the Direction of the Court:

/s/ Michael E. ———
Clerk
U.S. Court of Appeals
Eighth Circuit

Supreme Court, U.S.
FILED
SEP 1 1992
OFFICE OF THE CLERK

No. 91-1966

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ANR FREIGHT SYSTEM, INC.,

Petitioner,

v.

FRANCIS L. PHILIPP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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September 1, 1992

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QUESTION PRESENTED

Was the court of appeals correct in holding, in a case under the Age Discrimination in Employment Act, that the district court erred by refusing to allow the jury to consider evidence of 17 prior complaints of age discrimination, concerning allegations proximate in time and factually similar to those made by the plaintiff, which were offered to impeach the defendant's witnesses, to show a pattern and practice of unlawful discrimination, and to demonstrate an unlawful motive, intent, common scheme, or plan?

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No. 91-1966

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ANR FREIGHT SYSTEM, INC.,

Petitioner,

v.

FRANCIS L. PHILIPP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Introduction

Petitioner ANR Freight Systems, Inc. has submitted an inaccurate and incomplete account of the facts in a misguided attempt to persuade this Court that the decision below presents an important question of federal

law. Therefore, in an effort to bring some balance to this Court's perspective on the case, respondent, Francis L. Philipp, offers his own statement of the case.

B. The Case Below

This action was originally filed in the U.S. District Court for the Western District of Missouri in November, 1986. In November, 1984, the Plaintiff, Francis Philipp, aged 52, was demoted from his position as operations manager by Defendant, ANR Freight Systems, Inc. ("ANR"). Philipp alleged in his complaint that this demotion violated the Age Discrimination in Employment Act, ("ADEA"), 29 U.S.C. Section 621, *et seq.* Philipp alleged other violations of the ADEA because of ANR's refusal to promote him when the operations manager position became available on seven subsequent occasions, while promoting younger, less qualified employees for that position.

The evidence at trial showed that Philipp, who has 40 years of experience in the trucking industry, began his employment with ANR in 1976 as a dock supervisor. Prior to his demotion in 1984, he held the positions of dispatcher, assistant terminal manager, and operations manager. Philipp held the position of operations manager from 1981-84, in which he supervised 65 employees.

At trial, ANR admitted that Philipp was physically capable of performing the duties of operations manager and understood his job responsibilities. ANR consistently appraised his performance as satisfactory or above average. ANR admitted Philipp never refused to perform any job tasks or follow any directions given to him by his supervisor, and that he always followed ANR procedures. From 1976-1984, prior to his demotion, Philipp was

never reprimanded or counseled by any of his supervisors regarding any job deficiencies, nor was he ever told his work was unsatisfactory. Philipp was given salary increases and promotions by ANR.

In April, 1984, ANR began hiring younger men in supervisory positions. Walt Ainsworth, aged 31, was hired as district manager. Steve Emihiser, aged 38, was brought in as a regional manager. Ron Howe, in his early 40's, was promoted to assistant terminal manager. Alexander Baker, also in his early 40's, was brought in as one of Philipp's supervisors. From April, 1984, to his demotion in November, 1984, Philipp noticed changes in the younger supervisors' attitudes toward him. Philipp testified that Ainsworth, Baker, and Howe began to "lean on him" and to "nitpick."

Despite the adequacy of Philipp's job performance, on November 25, 1984, Philipp was demoted from his position as operations manager to dock supervisor. Philipp's immediate supervisor Howe did not tell Philipp the reasons for the demotion, only that the decision came from the "Ivory Tower" (*i.e.*, the general office). Howe testified at trial that he did not want to demote Philipp and that he thought Philipp was doing a good job. At trial, testimony showed that ANR supervisors Ainsworth, Baker, and Emihiser, all of whom worked in the general office, made the decision to demote Philipp.

Immediately after Philipp's demotion, ANR promoted a younger and less qualified employee, Bo Rambo, aged 43, to the city operations manager position. Ainsworth, Baker, and Howe made the decision to promote Rambo. Rambo had been employed with ANR for approximately three months. Howe testified at trial that Rambo's qualifications and years with ANR were less than Philipp's, that Rambo could not handle the operations manager pos-

ition, and that a few months later Rambo was demoted. Howe also testified that when Rambo was demoted, ANR did not offer the position to Philipp.

The evidence showed that, immediately prior to the demotion, specific age-related remarks were made about Philipp. In particular, Philipp's supervisor, Baker, remarked about Philipp and Bob Willis (another older supervisor): "you can't teach old dogs new tricks and that they probably would never be part of the team." During this same time period, Ainsworth was heard to say, "Old people get in their ruts and don't want to make changes." Another ANR employee, Robert Cooley, testified at trial that Ainsworth wanted his supervisors "green" so that he could mold them and that Ainsworth also wanted "the older supervisors to carry their own weight and be like the younger ones." The district court excluded this evidence along with the evidence of other ADEA complaints against ANR. Offers of proof were made by Philipp on this important evidence.[1]

After Philipp's demotion, operations manager positions became available seven times. ANR continued to employ and promote other individuals, all younger and less qualified than Philipp, for the position of operations manager, many of whom were not within the class of persons protected by the ADEA and all of whom were hired after Philipp. Howe testified at trial that Philipp had more job experience and qualifications for

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[1] Because the Eighth Circuit reversed the district court's decision on the issue of the admissibility of the evidence of other ADEA complaints against ANR, it did not address the district court's rulings excluding the age-related remarks from trial on the basis of unfair surprise, but did state that the testimony would be admissible at the second trial. (Pet. App. 5a).

these operations manager positions, than did the people whom ANR selected for the positions.

At trial, there was testimony by ANR supervisory employee Dan Robertson that Howe and then ANR District Manager Richard Stiles did consider age when hiring supervisory employees. Robertson testified that he attended management meetings where Howe and Stiles made jokes about age and rejected applicants on the basis of age. At trial, there was testimony by ANR secretary Janice Kennedy that Philipp's supervisor, Emihiser, did consider age in hiring and firing decisions. Kennedy testified she was instructed by Emihiser's secretary B. Shaw to check the personnel files for the ages of ANR terminal managers Harry Morgan and Jerry Near. Kennedy further testified that shortly thereafter Harry Morgan was terminated.[2] This action was close in time to Philipp's demotion. The district court excluded this evidence and an offer of proof was made.[3]

This case was tried during the week of February 26, 1990. On the third day of trial, Philipp's counsel inquired as to whether the court would permit the use of numerous other ADEA lawsuits pending against

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[2] This firing resulted in another ADEA case filed against ANR, to wit: *See Harry Morgan v. ANR Freight System*, No. 87-2239. This case, involving an alleged reduction in force, was resolved in favor of ANR by summary judgment. However, the testimony of Kennedy as to Emihiser's secretary instructing Kennedy to check the personnel files for ages of supervisors was not known by Morgan or counsel until after summary judgment was granted.

[3] Again, the Eighth Circuit did not specificially address Philipp's offer of proof of this important evidence because the court had reversed the district court's decision on other grounds. (Pet. App. 5a).

ANR alleging age discrimination by persons similarly situated to Philipp be admitted in evidence before the jury. Philipp had alleged that ANR had engaged in a pattern and practice of discrimination.

These other ADEA complaints revealed that 28 middle management supervisors of ANR, like Philipp, had filed ADEA suits against ANR and/or Graves Truck Lines.[4] Fourteen of the lawsuits involving 22 employees named ANR as a Defendant, and that seven of those lawsuits, including Philipp's, named Graves Truck Lines as an additional defendant. A review of those seven complaints showed terminations from Graves Truck Lines subsequent to ANR's acquisition of Graves Truck Lines.

The similarities between all of the ADEA lawsuits are striking:

1. All of the plaintiffs were similarly situated, i.e. middle level managers in their 50s and 60s.
2. All of the plaintiffs were long time employees of ANR.
3. The cases are all in close time proximity, to each other, both in terms of filing date and time the discriminatory act occurred.
4. Many of the cases involved a demotion, followed by a termination.
5. Most of the plaintiffs claimed that a policy of discrimination existed which was implemented subsequent to the time ANR acquired Graves Truck Lines, Associated Truck Lines and Garrett Freight Lines.

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[4]Graves Truck Lines covers what is now known as ANR's Midwest Region.

6. All the alleged discriminatory terminations and demotions occurred *after* ANR acquired its three subsidiary companies.

In addition to the offer of proof made at trial, a written offer of proof was submitted to the Court (Respondent's App. A). The district court did not review the complaints, but summarily excluded the evidence at trial.

The case was tried for 4 days to a jury and a verdict was returned in favor of ANR. Philipp filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial on the District Court's exclusion of evidence and the denial of Philipp's offers of proof. On September 20, 1990, the District Court entered its order denying Philipp's motion for new trial.

The Eighth Circuit reversed and granted Philipp a new trial. (Pet. App. 1a-5a). The Court of Appeals held that the district court erred in excluding the other ADEA complaints against ANR, stating that "[t]he admission of such background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive." (Pet. App. 5a, quoting *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988)).

C. Errors in the Petition

The question presented to the Court by ANR in its petition is misleading in several respects. First, the other ADEA lawsuits did not solely name ANR's former subsidiaries as defendants, ANR was named as a Defendant in the majority of the lawsuits. Second, the characterization that ANR's subsidiaries were "independently managed" is a blatant misrepresentation to this Court. The record shows differently.

ANR has stated (Pet. 1) that the District Court did not issue a written opinion on the question ANR presents to the Court. To the contrary, the issue was addressed by the District Court in its order dated September 20, 1990. (Res. App. B; infra, 13a). Although ANR has submitted the trial transcript containing the arguments of counsel on this issue, ANR neglects to inform the Court that a written offer of proof was filed with the District Court. (Res. App. A; 1a-7a; infra).

ANR makes every attempt throughout its petition to distance itself from the other ADEA complaints and to create the false impression that ANR had nothing to do with Philipp's demotion. ANR tries to accomplish this in two ways. First, ANR misleads the Court by consistently stating that Philipp's employment was with Graves Truck Lines rather than with ANR. Second, it alleges that a corporate consolidation occurred in 1985 of three operating subsidiaries, Graves Truck Lines (GTL), Associated Truck Lines (ATL), and Garrett Freight Lines (GFL), and that prior to 1985 these subsidiaries were indepdendent of ANR. Both positions are not supported by the record.

As to the supposed independent operation of ANR's subsidiaries, the record before the trial court included the following:

1. ANR's own management employees, Ainsworth and Emihiser, testified that during 1978-1988 they were employed by ANR, but were assigned to terminals for Garrett Freight Lines, Associated Truck Lines, and Graves Truck Lines.

2. ANR's own Company Policies Manual in effect in 1984, dictated policies and procedures for all three subsidiaries, including the policies for filling job vacancies, demotions, and terminations. ANR's own

Company Policies Manual states explicitly the policies set out therein applied to ANR and its subsidiaries.

3. Philipp's paychecks and other personnel documents all showed ANR was his employer and the payroll documents came from ANR's corporate headquarters in Denver, Colorado.

4. In 1983-85, Associated Truck Lines and Graves Truck Lines shared the same terminal in St. Louis; Graves Truck Lines and Garrett Freight Lines shared the same terminal in Denver; drivers for Graves Truck Lines delivered freight to the Associated Truck Lines terminal in St. Louis and drivers for Associated Truck Lines delivered freight to the Graves Truck Lines Terminal in Kansas City; and all three subsidiaries used one freight bill and all three subsidiaries shipped freight on the same trucks.

The record before the trial court showed, without a doubt, that the three subsidiaries did in fact share operational, managerial, and executive personnel. Thus, it made perfect sense to offer evidence of complaints of ANR's discriminatory treatment throughout its corporate structure.

ANR further states (Pet. 3) that Philipp was demoted because he was unable to "accept and implement new procedures and management techniques adopted by ANR to increase the Kansas City terminal's productivity and profitability." ANR is referring to a procedure ANR adopted called the MMI "Accu-Route System." In 1984, ANR hired a company, Management Methods, Inc. ("MMI") to do a productivity study at ANR's Kansas City terminal and suggest new ways to increase productivity in the terminal. MMI suggested the use of the "Accu-Route System" to be implemented in ANR's dock

operations. ANR neglects to inform this Court that Philipp worked in city dispatch, a completely different department than the dock operations and that Philipp had no responsibility or control over the new system since his area of responsibility was city dispatch. ANR further neglects to inform the Court that the Accu-Route System was not even installed at ANR's Kansas City terminal until after Philipp was demoted. ANR also does not mention that MMI president Don Lostumbo testified that he had observed Philipp's job performance, that Philipp did follow ANR procedures, and that there was no actual existing problem with Philipp's job performance. ANR has brought this issue up in its petition as a red herring, to detract from the real issue, *i.e.* the evidence of the other ADEA lawsuits.

ANR's statement that the other ADEA cases were filed over a 10-year period is also misleading. While it may be true that the first and last complaints were filed over a 10-year period, the majority of the cases were filed in close proximity to one another, from 1980-1985. Furthermore, the relevant inquiry is not the time of filing, but the time the discriminatory acts occurred. Viewing the other ADEA complaints from the time each alleged discriminatory act by ANR occurred, the record reveals most of the complaints were in close time proximity, from 1980-1985.

Petitioner misleads the Court by stating Philipp's only evidence was the other ADEA complaints. As stated above, there were other specific age-related remarks made about Philipp and older employees, and taking those in context with the other ADEA complaints, and other evidence, could lead a reasonable jury to find willful and intentional age discrimination. While the

other ADEA complaints may not show discrimination standing alone, the evidence was important evidence to be presented to the jury.

REASONS FOR DENYING THE WRIT

A. IN AN ADEA ACTION, RELEVANT EVIDENCE MAY INCLUDE PRIOR COMPLAINTS OF DISCRIMINATION, AND THERE IS NO SPLIT IN THE CIRCUITS ON THAT ISSUE.

Petitioner argues that the Eighth Circuit's decision is inconsistent with previous holdings of this Court and several of the courts of appeals. As is demonstrated by the facts in this case and existing case law, this case does not present such a situation and is not worthy of review.

A plaintiff in an employment discrimination case can establish a prima facie case by presenting either direct or circumstantial evidence. Direct evidence may include evidence of actions or remarks of the employer that reflect a discriminatory attitude. In the absence of, or in addition to, such direct evidence, a plaintiff may present circumstantial evidence. A defendant's admission of discriminatory intent is unlikely; therefore, that intent will ordinarily have to be found by "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v. Metro. Housing Corp.*, 429 U.S. 252, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977). A plaintiff may demonstrate an inference of discrimination in *whatever manner* is appropriate in the particular circumstances." *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1361 (9th Cir. 1985) (emphasis added). The Supreme Court and the circuit courts have undertaken to list many subjects of inquiry from which discriminatory intent may be inferred. These include: (1) a prior history of discriminatory acts, (2) the employer's

treatment of the plaintiff during his employment; and (3) differential treatment of persons similarly situated. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *United Airlines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977); *Williams v. Anderson*, 562 F.2d 1081 (8th Cir. 1977). As the Eighth Circuit stated in *Williams*, "proof that the defendants engaged in . . . discriminatory practices and policies prior to the period of time for which relief is available . . . is relevant since it creates the inference that the discrimination continued." *Id.* at 1086 n.7.

ANR fails to apprise this Court of numerous decisions from the other circuit courts and district courts on the issue of "prior bad acts" that allow the introduction of evidence of prior complaints in discrimination cases. *See e.g. Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356 (10th Cir. 1987); *Harpring v. Continental Oil Co.*, 628 F.2d 406 (5th Cir. 1980); *Perricone v. Success Motivation Institute, Inc.*, 10 Fed. Rules Evid. Serv. 938 (S.D.N.Y. 1982); *Kneisley v. Hercules*, 577 F.Supp. 726 (D. Del. 1983). For example, in *Harpring*, the court stated that, "it is clear that the testimony of similarly situated employees and the reason for their discharge are relevant in proving a pattern and practice of discrimination." 628 F.2d at 409. In *Kneisley*, the court held that a plaintiff in an ADEA case could introduce testimony of coworkers who also were subject to Defendant's discriminatory reduction in force plan. 577 F.Supp. at 731.

The federal courts are consistent in holding that evidence of prior acts in the form of claims and complaints *are* admissible. In *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356 (10th Cir. 1987), the court permitted evidence of past incidents involving seven other persons

who had made complaints against the defendant, prior to plaintiff's complaint for trespass. Evidence of these complaints were in the form of correspondence and claims reports. 815 F.2d at 1362. Similarly, in *Perricone v. Success Motivation Institute, Inc.*, 10 Fed. Rules Evid. Serv. 938 (S.D.N.Y. 1982), the plaintiff sought to introduce evidence of 75 complaints filed against the defendant. The court permitted the plaintiff to introduce the 75 complaints against the defendant company for the purpose of establishing scienter and reckless conduct on the part of the defendant. Therefore, it is clear the Eighth Circuit's decision is consistent with the other lower court precedent and this Court's flexible approach to the types of evidence available in discrimination cases set out in *Arlington Heights*. The federal courts do, on a consistent basis, permit evidence of general patterns of discrimination of prior discriminatory acts by an employer in an individual disparate treatment case.

1. In an ADEA action, under Fed. R. Evid. 404(b) prior complaints of discrimination are admissible.

During trial, Philipp relied on Federal Rules of Evidence 404(b) for admissibility of the other ADEA complaints (Pet. App. 5a). That rule specifically states that evidence of other wrongs or acts *may* be admitted to show motive, intent, knowledge, or the absence of mistake or accident. The other ADEA suits were offered to show that, since 1980, ANR has been engaged in a systemwide plan to discriminate against employees in the protected age group. This evidence was relevant to prove a pattern and practice of discriminatory conduct on the part of ANR against persons in the protected class and to

show ANR's overall discriminatory employment practices. The evidence was also probative of ANR's motive, intent, knowledge, and willful conduct towards persons in the protected age group. Although ANR challenges the admissibility of the complaints on hearsay grounds and under Rule 403 (Pet. 12), under Rule 404(b), the evidence was admissible. ANR did not inform the Court of Rule 404(b). However, it does acknowledge (Pet. 12) that allegations in complaints may be admissible to prove "notice" which *is* one of the purposes for which "prior bad acts" may be admitted. *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir.), cert. dismissed, 454 U.S. 1130 (1981).

2. **In an ADEA action, evidence of prior complaints of discrimination are relevant for impeachment purposes.**

ANR neglects to inform the court that at trial, Philipp's counsel offered the other ADEA complaints for impeachment purposes. ANR's sworn answers to Plaintiff's interrogatories stated there were only two other ADEA cases against ANR, other than Philipp's, when in fact there were numerous other ADEA suits naming ANR as a defendant. Indeed, on February 21, 1990, the district court entered an order imposing sanctions upon ANR for failing to fully and truthfully answer Philipp's discovery requests on this very issue. (Res. App. C, p. 16a-18a). This evidence was clearly admissible for impeachment purposes, to show that ANR's answers were not true when made.

3. The other ADEA complaints were not hearsay.

Lastly, despite ANR's protestations to the contrary, it would not be hearsay to use these other ADEA cases to question ANR and ask how many ADEA complaints by ANR employers, ANR had received. Put simply, they were not offered for the truth of the matter asserted. *See* Fed. R. Evid. 404(b). This evidence would clearly be admissible to establish knowledge, intent, and motive. It also is not hearsay to use these other ADEA cases to question whether ANR's officers and employees had personal knowledge of the factual allegations set out in the complaints.

4. ANR's reliance on FRE 403 is misplaced and presents no basis for review.

ANR's reliance on Rule 403 is misplaced. There is no foundation for the company's assertion that admission of the prior complaints would be unduly prejudicial, nor is there any reason to second-guess the Eighth Circuit on such a highly fact-specific question. "Exclusion under Rule 403 is an extraordinary remedy and should be used sparingly." *K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1155 (10th Cir. 1985). Especially in discrimination case there should be no "blanket evidentiary exclusion" because:

> "The effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which Plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives . . . Circumstantial proof of discrimination typically includes unflattering testimony about the employer's history and work practices in evidence which in other kinds of cases may well unfairly prejudice the jury against

> the Defendant. In discrimination cases, however, such background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive." *Estes* 856 F.2d at 1103.

The Eighth Circuit wisely applied the principles it had set out in *Estes*, and ANR presents no compelling reason for review here.

5. **Review of this case at this point is unnecessary and premature.**

Even if this case presented potentially important issues of federal law – which it does not – at this point in Philipp's case, review of the admissibility of the other ADEA complaints by this Court would be premature. The Eighth Circuit ruled only that the district court erred by flatly barring this evidence without considering whether it was probative to show motive or a common scheme or plan. It will be up to the district court at trial to carefully consider the offer of proof, to determine whether there is a pattern in the complaints and a similarity between the complaints and Philipp's allegations, and to decide which, if any, of the complaints are inadmissible. Moreover, the Eighth Circuit's ruling that other critical evidence must be admitted (*See* Supra note 3; *see also supra* note 5), necessitates a second trial, and will allow the court and jury to view the prior complaints in the context of all the relevant evidence. After a second trial, there will be time enough for appellate review of the district court's evidentiary holdings, a review which can be made on the basis of ā fuller, more complete record. Review at this time is unnecessary.

6. The cases relied on by Petitioner are not in conflict with the Eighth Circuit's decision.

ANR cites *Goff v. Continental Oil Company*, 678 F.2d 593 (5th Cir. 1982), *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1989), and *Mauter v. Hardy Corp.*, 825 F.2d 1554 (11th Cir. 1987) for the general principle that evidence of other discriminatory acts by an employer is relevant *only* if it concerns those invididuals specifically responsible for the alleged discrimination against the plaintiff. *None* of those cases stand for that principle. In *Goff*, 678 F.2d 593, while the Fifth Circuit did prohibit testimony of three former Conoco Employees, the Court stated that it was possible to establish the existence of a pattern or practice by evidence of other discriminatory acts by a defendant.

Similarly, in *Fortino*, 950 F.2d 389, the Seventh Circuit stated that there may be situations where evidence of employees outside the chain of decision also may have valuable information bearing on the charge of discrimination. *Id.* at 396. Presented with the fact situation in Philipp's case, *i.e.* the age-related remarks *and* the numerous other ADEA complaints involving similarly situated employees, the Seventh Circuit would likely consider the evidence admissible.

Lastly, in *Mauter*, the evidence suggesting age discrimination was an affidavit filed by an ADEA plaintiff that included a statement by a former employee that the company was going to "weed out the old ones". That same former employee filed an affidavit denying making that assertion to the Plaintiff and stating he had no knowledge of any facts suggesting age discrimination. Thus, the Eleventh Circuit's highly fact-specific decision to exclude this obviously questionable and self-serving affidavit, says nothing about the issue presented in Philipp's case.

None of these cases are inconsistent with the Eighth Circuit as ANR claims and in fact *Goff* and *Fortino* both acknowledge that other discriminatory acts can be used to prove discrimination. Indeed, as indicated above, the Supreme Court and other appeals courts on a consistent basis permit evidence of general patterns of discrimination or prior discriminatory acts by an employer in an individual disparate treatment case.

B. ANR's RELIANCE ON THIS COURT'S DECISIONS IN *MAYOR OF PHILADELPHIA* AND *TEAMSTERS* IS MISPLACED, AND PRESENTS NO BASIS FOR REVIEW.

ANR also argues that evidence of a pattern of discrimination is relevant and admissible *only* if it is "statistically meaningful." ANR cites in support of that principle two Supreme Court cases, *Mayor of Philadelphia v. Educational Equality League,* 415 U.S. 605, 39 L.Ed.2d 630, 94 S.Ct. 1323 (1974), and *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977). Neither of these cases stand for that principle. Both cases acknowledge that statistical analyses can provide important indirect evidence of discrimination. *Mayor of Philadelphia,* 415 U.S. at 620, 39 L.Ed.2d at 644; *Teamsters,* 431 U.S. 339, 52 L.Ed.2d at 417. Further, in the *Teamsters* case, the Court recognized that the usefulness of statistics depends on *all* of the surrounding facts and circumstances. 431 U.S. at 340. Neither one of those cases rejected the use of other lawsuits or complaints in employment discrimination cases.

ANR next claims that the decision in *Simpson v. Midland-Ross Corp.,* 823 F.2d 937 (6th Cir. 1987), is in conflict with the Eighth Circuit's decision. In *Simpson,*

the plaintiff, unlike Philipp, offered no direct evidence of age discrimination, but offered *only* statistics regarding decreasing employee age and the average age of persons hired and retained and evidence of the departure of 17 people without any evidence as to the reasons those persons departed from the company. *Simpson* did *not* reject the use of other lawsuits or complaints. Rather, the court held that the plaintiff had not put the statistics in context, by showing a pattern of employer activity that could lead to a suspicion of age discrimination. In contrast, Philipp's evidence of the numerous other ADEA suits showed strong similarities with each case and Philipp's case *along with* direct evidence of age-related remarks by ANR management employees. It is this direct evidence, taken along with the other ADEA complaints, that shows a pattern of employer activity that could lead a reasonable jury to a finding of age discrimination. The cases are thus clear; while a small sample size might in a certain situation detract from the usefulness of the statistics, the test is to look at *all* of the surrounding facts and circumstances. When that test is utilized in this case, there is no question, that the evidence is relevant to support an inference of discrimination.

CONCLUSION

The Eighth Circuit's decision is consistent with decisions of this Supreme Court and other federal courts, and in its finding that the trial court committed reversible error by excluding evidence showing a background of age discrimination was eminently reasonable. The record in this case showed the trial court excluded direct evidence which tended to show an atmosphere of age bias, not just the other ADEA complaints. There was enough direct evidence of discrimination to make the indirect "pattern and practice" evidence relevant.

The Petition for Writ of Certiorari should also be denied because the Eighth Circuit decision does not establish any new rules threatening the *McDonnell-Douglas,* "shifting burdens" framework, nor does it present any intolerable conflict among circuit courts on that issue.

Respectfully submitted,

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September 1, 1992

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 86-1258-CV-W-1

FRANCIS L. PHILIPP,

Plaintiff,

v.

ANR FREIGHT SYSTEMS, INC.,

Defendant.

OFFER OF PROOF

This offer of proof is made in writing pursuant to the Court's verbal instructions on February 28, 1990. All complaints made a claim of age discrimination against the Defendant company as indicated.

(continued) →

Name	*Court*	*Last Position*
Dillard McBride v. ANR (over 40) filed 8/23/89, length of employment unknown Case No. CA3-89-2151-G	U.S.D.C., N. Dist. of Texas	Regional Safety Mgr. discharged
James E. Caddy v. ANR, age 49, filed 11/17/89, 21 years employment, Case No. 89CV4719	District Court Jefferson County, CO discharged	Vice President of Operations
Lawrence A. Hall v. ANR age 41, filed 11/17/89, 14 years employment, Case No. 89CV4719	District Court Jefferson County, CO discharged	Vice President of Operations
Robert M. Nelson v. ANR, age 62, filed 11/17/89, 29 years employment, Case No. 89CV4719	District Court Jefferson County, CO discharged	Director of line haul
Norman H. Schiffman, age 55, filed 11/17/89, 16 years employment Case No. 89CV4719	District Court Jefferson County, CO discharged	Director of Information

Name	*Court*	*Last Position*
Joel Dan Linker v. Graves Truck Lines, age 60 filed 9/19/80, 9 years employment Case No. CIV-80-1083W	U.S.D.C., W. Dist. Oklahoma	Terminal Manager
Robert E. Mecum v. ANR, age 53, filed 2/12/82, 11 years employment, Case No. 81-1113	U.S.D.C. District for Kansas discharged	District Manager
Richard Stec v. Associated Truck Lines, over 40, filed 1/19/84, Number of years employment unknown, Case No. 84-401991	Michigan Circuit Court Wayne County discharged	Unknown
John Kopp v. ANR, age 53, filed 10/30/87, Prevention, 26 years employment Case No. 87-726292-CZ	Michigan Circuit Court Wayne County discharged	Claims Supervisor
Robert W. Apple v. Associated Truck Lines, age 56, filed 5/3/83, 31 years employment Case No. C-3-83-410	U.S.D.C. S. Dist. Ohio discharged	Terminal Manager

(continued)

Name	*Court*	*Last Position*
Earl E. Meisenbach v. Associated Truck Lines and ANR, Age 55, Filed 9/14/83, 10 years employment, Case No. G83-1046 CA1	U.S.D.C. W. Dist. Michigan discharged	Senior Vice President
Donald E. Halloran v. Associated Truck Lines and ANR, age 53, filed 5/4/85, 22 years employment, Case No. C-3-83-415	U.S.D.C. S. Dist. Ohio discharged	Sales Representative
Robert Webster v. Associated Truck Lines and ANR, age 54, filed 7/13/84, 16 years employment, Case No. 84-770 CA1	U.S.D.C. W. Dist. Michigan Southern Div. discharged	Maintenance Manager
William Stephan v. Associated Truck Lines and ANR, age 60, filed 3/7/84, 36 years employment, Case No. G84-208 CA1	U.S.D.C. W. Dist. Michigan Southern Div. discharged	Manager of Purchasing and Maintenance
Donald Oleniczak v. Associated Truck Lines and ANR, age 50, filed 3/6/84, 11 years employment, Case No. G84-198 CA	U.S.D.C. W. Dist. Michigan Southern Div. discharged	General Manager and manager of special products

Name	*Court*	*Last Position*
John P. Dinger v. ANR, age 56, filed 1984 15 years employment	U.S.D.C. W. Dist. Michigan Southern Div. discharged	President of Road Equipment
Leo Lust vs. Graves Truck Line and ANR, over 40, Filed 3/11/83, 27 years employment Case No. 83-1463	U.S.D.C. for Dist. Kansas demoted	Treasurer
Jon R. Brown v. ANR age 46, filed 2/20/86 5 years employment Case No. 3-86-0456 H	U.S.D.C. N. Dist. Texas Dallas Div. discharged	Salesman
Donna Boatwright v. ANR Over 40 filed 2/20/86 Case No. 3-86-0456 H	U.S.D.C. N. Dist. Texas Dallas Div. discharged	Unknown
Dannah Rose v. ANR over 40 filed 2)20/86 Case No. 3-86-0456 H	U.S.D.C. N. Dist. Texas Dallas Div. discharged	Unknown

(continued)

Name	*Court*	*Last Position*
Phil Williams v. ANR over 40 filed 2/20/86 Case No. 3-86-0456 H	U.S.D.C. N. Dist. Texas Dallas Div. discharged	Unknown
Leanna Beattie v. ANR over 40, filed 6/18/86 18 years employment Case No. G86-294	U.S.D.C. W. Dist. Michigan Southern Div. discharged	Accounting Specialist
Harry Morgan v. ANR age 57, filed 5/21/87 15 years employment Case No. 87-2239-0	U.S.D.C. Dist. of Kansas Laid-off	Terminal Manager
Roger A. Martin v. Associated Truck Lines, over 40 Case No. 85-3897	U.S. Court of Appeals Sixth Circuit discharged	Unknown
John L. Wyse v. Associated Truck Lines, et al., over 40 Case No. 85-3897	U.S. Court of Appeals Sixth Circuit discharged	Unknown

Name	*Court*	*Last Position*
Frank Williams v. Associated Truck Lines, et al., over 40 Case No. 85-3897	U.S. Court of Appeals Sixth Circuit discharged	Unknown
James Danforth v. Associated Truck Lines, et al., over 40, Case No. 85-3897	U.S. Court of Appeals Sixth Circuit discharged	Unknown
Garold L. Burke v. Associated Truck Lines, et al., over 40, Case No. 85-3897	U.S. Court of Appeals Sixth Circuit discharged	Unknown
Gale D. Elder (56) v. ANR, filed 3/88, 15½ years employment Case No. C-1-88-9252	U.S.D.C. S. Dist. Ohio W. Div. Cincinnati Lay off	Unknown

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 86-1258-CV-W-1

FRANCIS L. PHILIPP,

Plaintiff,

v.

ANR FREIGHT SYSTEM, INC.,

Defendant.

ORDER

Before the court is Plaintiff's Motion for Judgment Notwithstanding the Verdict and/or For New Trial, filed March 9, 1990. This court presided over a jury trial of this matter in which the jury returned a verdict in favor of the defendant. Plaintiff's claim, brought pursuant to the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. §621, *et seq.*, alleged that plaintiff was demoted by defendant because of his age.

Plaintiff moves the court to enter a judgment notwithstanding the verdict ("j.n.o.v.") because the great weight of the evidence called for a verdict in plaintiff's favor. A party cannot be granted a j.n.o.v. unless that party first moved for a directed verdict at the close of all the evidence. *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 294 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205

(1983). In the instant case, plaintiff failed to move for a directed verdict at either the close of his evidence or all the evidence. Accordingly, the court cannot now grant plaintiff a n.j.o.v.[1]

Alternatively, plaintiff asks the court to grant him a new trial for the following reasons:

(1) the verdict was clearly contrary to the weight of the evidence;
(2) the court erred in denying plaintiff's Motion for Recusal and Mistrial;
(3) the court erred in submitting to the jury Instruction Nos. 3A, 4 and 9;
(4) the court erred in denying plaintiff's offer of proof of admissible evidence;
(5) the court erred in denying the submission of willfullness to the jury; and
(6) the court erred in denying the submission of all back damages and front pay to the jury.

1. Verdict was Contrary to the Weight of the Evidence

Before a new trial can be granted " 'the jury's verdict must at least be against the great weight of the evidence . . .' " *Fireman's Fund Insurance Co. v. Aalco Wrecking Co.*, 466 F.2d 179, 187 (8th Cir. 1972) (emphasis in original). The verdict clearly was not against the great weight of the evidence. Although plaintiff alleged age discrimination, defendant articulated at least six specific legitimate reasons for plaintiff's demotion. These reasons were supported by evidence elicited from several

[1] Even if plaintiff had followed the correct procedure to preserve a motion for j.n.o.v. the plaintiff would not be entitled to a j.n.o.v. because the great weight of the evidence was not wholly in plaintiff's favor. *See, Fireman's Fund Insurance Co. v. Aalco Wrecking Co.*, 466 F.2d 179, 187 (8th Cir. 1972).

of defendant's witnesses. There was no "great weight of the evidence" pointing to a verdict certain to favor the plaintiff.

2. Denial of Plaintiff's Motion for Recusal and Mistrial

Plaintiff asks for a new trial because the court refused to recuse itself from this case after the court made certain remarks, without the jury present, that the plaintiff argues indicated the court's bias and prejudice toward Title VII cases.[2] Recusal is only required when the trial court's bias is extrajudicial. *Moore v. McGraw Edison Co.*, 804 F.2d 1026, 1032 (8th Cir. 1986). Furthermore, "[t]he alleged bias and prejudice to be disqualifying must also result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *Id.* at 1032. "Disqualification is not required because the judge has definite views as to the law of a particular case." *Id.* "Thus, a motion for disqualification ordinarily may not be predicated . . . on a particular judicial leaning or attitude derived from his experience on the bench." *Phillips v. Joint Legislative Committee*, 637 F.2d 1014, 1020 (5th Cir. 1981).

In the instant case, merely because the court commented on Title VII cases in general was not a basis for this court's recusal. Moreover, since the court's comments were made outside the hearing of the jury there was no basis for a mistrial. *See, Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1330 (8th Cir. 1985).

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[2] As previously noted, plaintiff's claim was based on the ADEA, not Title VII.

3. Submission to the Jury of Instruction Nos. 3A, 4 and 9

Plaintiff argues that the court erred because it gave the jury these instructions over plaintiff's objection that they were confusing, misleading, and did not state the applicable standards of law, namely, the *McDonnell-Douglas*[3] burden-shifting test. Allegations of ambiguity and confusion are insufficient to preserve the issue of instructional error for review, *Lange v. Schultz*, 627 F.2d 122, 128 (8th Cir. 1980), therefore, the only issue left is whether the court erred in not giving the *McDonnell-Douglas* burden-shifting test as part of the verdict director (instruction no. 9).

"When an ADEA case is tried by a jury, '[t]he central issue, which the court must put directly to the jury, is whether or not plaintiff was discharged because of his age.' " *Smith v. University of North Carolina*, 632 F.2d 316, 332 (4th Cir. 1980). The Eighth Circuit Court of Appeals has held that "the four criteria set forth in *McDonnell-Douglas v. Green*, . . ., provide *one way* of establishing a prima facie case of employment discrimination." *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 289 (8th Cir. 1982) (emphasis added).

The court's instruction no. 9 read as follows:

> Your verdict must be for plaintiff Francis Philipp if plaintiff has proved all of the following elements by a preponderance of the evidence:
>
> First, defendant demoted plaintiff; and
>
> Second, plaintiff's age was a determining factor in defendant's decision to demote plaintiff.
>
> If either of the above elements have not been proved by a preponderance of the evidence, your verdict must be for defendant.

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[3] 411 U.S. 792, 36 L.Ed.2d 668 (1973).

> "Age was a determining factor" only if the decision to demote would have been different except for his age. It does not mean that age was the sole or exclusive reason for the decision to demote, but that age must have been a factor that made a difference in that decision.

Clearly, this instruction put forth *the* central issue in the case – whether plaintiff was demoted because of his age. Additionally, this instruction was patterned after the instruction specifically recommended in the Manual of Model Civil Jury Instructions for the Eighth Circuit for use in ADEA claims.[4] The court did not err in giving this instruction.

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[4]The manual's instruction (recommended for use by the district courts in the Eighth Circuit) reads as follows:

> Your verdict must be for plaintiff if all the elements have been proved by a preponderance of the evidence:
>
> First, defendant demoted plaintiff; and
>
> Second, plaintiff's age was a motivating factor in defendant's decision.
>
> If any of the above elements have not been proved by a preponderance of the evidence, your verdict must be for defendant and you need not proceed further in considering this claim.
>
> However, even if you find both of the above elements have been proved, your verdict must be for defendant if defendant proves by a preponderance of the evidence, that it would have demoted plaintiff regardless of his age.

The court's instruction no. 9 was a modified version of this recommended instruction. However, one could persuasively argue that the court's instruction was more favorable to the plaintiff because the court's instruction deleted the last paragraph which clearly gives the jury another opportunity to consider finding for the defendant.

4. Plaintiff's Offers of Proof

Plaintiff also requests a new trial asserting that the court erred because it excluded evidence proffered by the plaintiff. First, plaintiff asserts that the court should have allowed evidence of other ADEA suits filed against defendant to be introduced. The court properly excluded this evidence; any such evidence is irrelevant, inadmissible, unduly prejudicial, and would require an examination of the merits of those obviously collateral suits as well as the plaintiff's. *See, Johnson v. Yellow Freight System, Inc.*, 734 F.2d 1304, 1311 (8th Cir. 1984). Additionally, plaintiff failed to prove that the other cases were sufficiently similar to the case at bar.

Next, plaintiff states the court erred in excluding allegedly inculpatory remarks made by plaintiff's superiors. Plaintiff sought to introduce this evidence through the testimonies of Dan Robertson, Janice Kennedy and Robert Cooley. However, it was discovered that these witnesses had not informed defendant of these allegedly inculpatory remarks although they had been interviewed and asked by defendant about their knowledge of any possible inculpatory remarks on the part of defendant.

Defendant was precluded from preparing for the cross-examination of these witnesses regarding these alleged remarks, and further precluded from preparing rebuttal evidence. It was obvious to the court that these witnesses either recklessly or intentionally "forgot" to reveal this crucial information to defendant prior to trial. With this in mind, the court properly excluded this testimony.

> Rules 26 & 37, the discovery-deposition provisions of the Federal Rules were intended to insure "proper litigation," by making the "trial less a game of

> blind man's buff [sic] and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.

Scott & Fetzer Co. v. Dile, 643 F.2d 670, 674 (9th Cir. 1981) (citations omitted).

Plaintiff argues that the court erred because it did not allow evidence of the dates of hire and birth of defendant's managers to be admitted. Plaintiff sought to introduce this evidence through the testimony of witnesses who only had second-hand knowledge of the information, rather than personal knowledge. Therefore, the court properly excluded this testimony as hearsay. Plaintiff had the opportunity to properly introduce this evidence but failed to do so through no fault of the court.

Plaintiff also argues that the court should have allowed evidence regarding the job performance of defendant's other operations managers. The court properly excluded this evidence as irrelevant since no one questioned plaintiff's ability as an operations manager.

Plaintiff also claims the court should have allowed him to testify that Bo Rambo, Robert Cooley and Carter Walker had been demoted. Plaintiff did not have personal knowledge of Mr. Cooley's alleged demotion, and, therefore, the court properly excluded this evidence for lack of foundation and as hearsay. Moreover, other witnesses (with first-hand knowledge) testified regarding the demotions of Bo Rambo and Carter Walker. Thus, there was no need to have plaintiff (who only had second-hand or hearsay knowledge) testify regarding Mr. Rambo and Mr. Walker and their alleged demotions.

5. Submission of Willfulness to the Jury

Plaintiff argues that the court should have submitted the issue of willful discrimination to the jury. An employer acts willfully with respect to age discrimination " 'if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' " *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1984). In the instant case there simply was no evidence of willful discrmination; a fact which was further evidenced by the jury's verdict in favor of defendant.

6. Submission of Damages to the Jury

Finally, plaintiff argues that the court erred in not submitting certain damages to the jury. Since the jury verdict was in favor of defendant, the issue of any alleged error regarding the submission of damages is moot and does not need to be addressed by the court.

Accordingly, it is

ORDERED that Plaintiff's Motion for Judgment Notwithstanding the Verdict and/or For New Trial, filed March 9, 1990 is denied.

/s/ Dean Whipple
Dean Whipple
United States District Judge

Date: Sept. 20th, 1990

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 86-1258-CV-W-1

FRANCIS L. PHILIPP,

Plaintiff,

v.

ANR FREIGHT SYSTEMS, INC.,

Defendant.

ORDER

Before the court is plaintiff's Motion for Supplementation of Discovery and for Sanctions, filed January 3, 1990. Suggestions in opposition and reply suggestions were filed.

Plaintiff asks the court to order defendant to supplement its answer to plaintiff's interrogatory no. 18 and plaintiff's request for production of documents no. 9. In interrogatory no. 18, plaintiff requests information regarding other age discrimination suits (ADEA suits) against defendant, and in its request for production of documents no. 9 plaintiff asks for "all documents" regarding ADEA, retaliation and/or harassment suits. The court finds that defendant should supplement its answers to these discovery requests. Any information regarding ADEA suits filed against defendant from 1977 to the

present may be relevant and could lead to admissible evidence. As to producing all documents regarding ADEA, retaliation and/or harassment suits, the court finds that only the petitions in ADEA suits should be produced.

Next, the court addresses plaintiff's motion for sanctions pursuant to Fed. R. Civ. P. 26(g) and 11. In answering interrogatory no. 18, defendant only identified one case. Defendant, supported by an affidavit by Bruce A. Bullock the Vice President, general counsel and Secretary of ANR, states in its suggestions in opposition that it interpreted the interrogatory and request for production to mean only those suits filed against Graves Truck Lines. The court finds this argument to be disingenuous at best considering the defendant in responding to other discovery requests had produced information regarding ANR as well as Graves Truck Lines. It appears that defendant suddenly decided to revert to a narrow interpretation of who the defendant was although, the file indicates that defendant had used the general interpretation before. Thus, the court finds that sanctions are appropriate since defendant's answers were made in bad faith, causing unnecessary delay and increasing the costs of litigation for the plaintiff.

Accordingly, it is

ORDERED that Plaintiff's Motion for Supplementation of Discovery and for Sanctions, filed January 3, 1990 is granted. It is further

ORDERED that defendant shall supplement its answer to plaintiff's interrogatory no. 18 within five (5) days of the date of this order by identifying all ADEA suits filed against defendant ANR from 1977 to the present. It is further

ORDERED that defendant shall supplement its response to plaintiff's request for production of documents no. 9 within five (5) days of the date of this order by producing the petitions of the ADEA suits filed against ANR since 1977. It is further

ORDERED that plaintiff's counsel shall submit to the court within ten (10) days of the date of this order all records regarding the expenses incurred, including attorney's fees, in contacting courts for records checks of other ADEA suits filed against ANR and for the attorney fees expended in filing this motion. It is further

ORDERED that defendant shall pay the above-mentioned attorney's fees and expenses after the court has reviewed and approved said expenses and attorney's fees.

/s/ Dean Whipple
Dean Whipple
United States District Judge

Date: Feb. 21st, 1990

Supreme Court, U.S.
FILED
SEP 4 1992

No. 91-1966

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

ANR FREIGHT SYSTEM, INC.,
Petitioner,

v.

FRANCIS L. PHILLIP,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER

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September 4, 1992

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IN THE

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ANR FREIGHT SYSTEM, INC.,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF PETITIONER

The majority of respondent's opposition simply sets forth his factual case-in-chief and his disagreement with certain minor factual "errors" in the petition. Respondent's Brief in Opposition ("Opp.") 2-10.[1] None of this

[1] In describing his case-in-chief, respondent relies upon certain testimony, Opp. 4, that was excluded from the trial on the ground that the witnesses "either recklessly or intentionally 'forgot' to reveal this crucial information to [petitioner] prior to trial." Order Denying Plaintiff's Motion for Judgment Notwithstanding the Verdict, Opp. App. 13a. Nevertheless, respondent's version of the facts does not differ significantly from petitioner's. As petitioner stated,

discussion alters the fact that the court of appeals held that disparate complaints of age discrimination are admissible as proof of discriminatory intent and, on that basis alone, set aside the jury verdict *in favor of petitioner.*

When respondent finally turns to the legal issue presented in the petition, his analysis is no more germane. Respondent first addresses the merits, arguing that complaints of discrimination are admissible, at the trial court's discretion, to prove discriminatory intent regardless of whether they are competent evidence. Opp. 13-14. Respondent then strongly suggests that the decision below does not mean what it says and that it stands only for the limited proposition that evidence of the type at issue in this case *may* be admissible, at the trial court's discretion, to impeach a witness or to prove notice. Opp. 14-16. Finally, at the tail end of his brief, he asserts—with virtually no analysis—that the opinion below does not conflict with the holdings of other circuits.

"[a]t trial, petitioner . . . articulated several legitimate, nondiscriminatory reasons for Phillip's demotion . . . . In response, Phillip sought to prove that GTL had in fact demoted him with discriminatory intent. . . . The jury returned a verdict in favor of petitioner." Pet. 3-5.

Petitioner does, however, take issue with several of respondent's statements and allegations. First, contrary to respondent's assertion, Opp. 6, *some* of the complaints did *not* name *either* ANRFS or GTL as defendants. *See, e.g.*, Offer of Proof, Opp. App. 3a (complaint of Richard Stec, complaint of Robert Apple). Second, respondent cites to nothing in the record itself concerning the relationship between ANR and its current and former subsidiaries. *See* Opp. 8-9. In any event, no evidence of this relationship was provided to the trial court as a foundation for respondent's offer of proof, and the Eighth Circuit did not rely upon any such evidence as a basis for its holding. Finally, contrary to respondent's assertions, Opp. 10, it is not in the least "misleading" to state that the complaints at issue were filed over a ten-year period. *See, e.g.*, Offer of Proof, Opp. App. 3a (complaint of Joel Dan Linker (1980), complaint of Dillard McBride (1989)).

Respondent's strained effort to rewrite the decision below cannot obscure the fact that the Eighth Circuit plainly held that *all of the complaints* at issue in this case—regardless of the named defendant or the date of the suit—*are admissible to prove discriminatory intent, and must be admitted* on remand. Moreover, respondent's weak effort to distinguish the unambiguous decisions of other courts merely confirms that the Eighth Circuit's broad holding charts a course squarely at odds with this Court and other courts of appeals. Finally, respondent's defense of the decision below on its merits is groundless. Because the conflicts raised by the Eighth Circuit's decision involve an important question of federal law, this case warrants resolution by this Court.

1. Respondent's efforts to put a benign face on the decision below fail. First, by arguing that the proof at issue would be admissable for impeachment purposes and that complaints are not hearsay when introduced to prove notice, Opp. 14-15, respondent suggests that the Eighth Circuit held that the evidence at issue is admissible for impeachment purposes or to prove notice. Second, by arguing that "[i]t will be up to the district court at trial to carefully consider the offer of proof . . . *and to decide which, if any, of the complaints are inadmissible,* Opp. 16 (emphasis added), respondent suggests that the Eighth Circuit's decision leaves the district court free to exclude some or all of the evidence at issue.

These arguments are flatly unfaithful to the actual language of the opinion and the holding of the court below. The Eighth Circuit plainly held that *all* of the evidence at issue *is* admissible *to prove that the defendant acted with discriminatory intent.* Specifically, it held—in language not mentioned by respondents—that all of this evidence "may be critical for the jury's assessment of whether a given employer was more likely than not to have acted *from an unlawful motive.*" Pet. App. 5a. This holding formed the sole basis for reversal of the

trial court's decision. Thus, contrary to respondent's suggestion, nothing in the Eighth Circuit's decision suggests that this evidence is admissible for limited purposes. Likewise, contrary to respondent's suggestion, nothing in the Eighth Circuit's decision suggests that the trial court will, on remand, have the discretion to exclude some of this evidence—*e.g.*, complaints that are not directed against ANR or GTL, or complaints that are not temporally proximate to respondent's demotion—for any reason. In short, respondent cannot avoid the effect of the court's actual holding by mischaracterizing the decision as standing for the unremarkable proposition that the evidence at issue is admissible for *some* purposes at the discretion of the trial court.

2. Respondent's efforts to defuse the conflicts created by the Eighth Circuit also fail. Respondent states baldly that *Goff* v. *Continental Oil Co.*, 678 F.2d 593 (5th Cir. 1982), *Fortino* v. *Quasar Co.*, 950 F.2d 389 (7th Cir. 1991), and *Mauter* v. *Hardy Corp.*, 825 F.2d 1554 (11th Cir. 1987), do not stand for the proposition that evidence of other discriminatory acts is relevant *only* if it concerns those individuals specifically responsible for the alleged discrimination against the plaintiff. Opp. 17. This is simply not true. Contrary to respondent's claim, Opp. 17, the Fifth Circuit made clear in *Goff* that it was *not* permissible to prove a pattern or practice of discrimination through testimony concerning prior bad acts by individuals unrelated to those responsible for the alleged discrimination. 678 F.2d at 596-97. Moreover, it declined even to comment on whether such evidence might have probative value in a claim for individualized discrimination. *Id.* at 597. And, although the Seventh Circuit stated in *Fortino* that "there *may* be cases where an employee who is outside the chain of decision . . . has valuable information bearing on the charge of discrimination," 950 F.2d at 396 (emphasis added), that court expressly endorsed the more general rule that "[a]ctions and comments by em-

ployees not involved in a discharge decision cannot provide a basis for charging other employees with discrimination," *id.* at 395. Finally, contrary to respondent's suggestion, the Eleventh Circuit intimated strongly in *Mauter* that a statement by an individual who played no part in a termination decision is "too attenuated to present a genuine issue of material fact." 825 F.2d at 1558.[2]

Similarly, respondent's claim, Opp. 18, that the Eighth Circuit's decision is not in conflict with this Court's decisions in *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605 (1974), and *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), both of which held that evidence of a pattern of discrimination is relevant, and hence admissible, only if it is statistically meaningful, is insupportable. While, as respondent suggests, this Court acknowledged in both of those cases that statistical analysis *can* provide important indirect evidence of discrimination, both cases unquestionably stand for the proposition that small samples make statistical evidence unreliable. 415 U.S. at 620-21; 431 U.S. at 340 & n.20. Likewise, respondent has misread *Simpson* v. *Midland-Ross Corp.*, 823 F.2d 937 (6th Cir. 1987). In that case, the Sixth Circuit directly held that numerical evidence that is not placed in context is statistically irrelevant and hence inadmissable.[3]

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[2] Respondent makes no attempt at all to distinguish *Schrand* v. *Federal Pac. Elec. Co.*, 851 F.2d 152 (6th Cir. 1988), which poses a conflict on remarkably similar facts. In that case, the Sixth Circuit held that "[t]he fact that two employees of a national concern, working in places far from the plaintiff's place of employment, under different supervisors, were allegedly told that they were being terminated because they were too old, is simply not relevant" to the question of whether the defendant discriminated against this plaintiff. *Id.* at 156.

[3] Here again, respondent makes no effort whatsoever to distinguish certain cases that petitioner demonstrated were in direct conflict with the Eighth Circuit's decision. *See* Pet. App. 11a. Specifi-

Finally, respondent makes no effort to defuse the conflict between the decision below and the Fifth Circuit's holding in *Soden* v. *Freightliner Corp.*, 714 F.2d 498 (5th Cir. 1983), the Sixth Circuit's holdings in *Broome* v. *Dazey Corp.*, 1989 U.S. App. Lexis 14335 (6th Cir. 1989), and *Wilson* v. *Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (1981), and the Ninth Circuit's holding in *Marx & Co.* v. *Diners' Club, Inc.*, 550 F.2d 505 (9th Cir.), *cert. denied*, 434 U.S. 861 (1977). All of these cases hold that civil complaints are inherently unreliable evidence of the truth of the matter asserted therein, and thus squarely conflict with the decision below.[4]

3. Respondent's defense of the merits of the decision below also fails. Respondent weakly argues, Opp. 13-14, that evidence of other complaints of age discrimination is admissible under Rule 404(b) of the Federal Rules of Evidence, at the trial court's discretion, to prove discriminatory intent.[5] Putting aside his misreading of the opinion—which, as noted, did not leave the question of admissibility to the trial court's discretion—this assertion is not entirely correct. Complaints about prior bad acts *may* indeed be admissible to prove discriminatory intent under certain circumstances, but they are not ad-

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cally, he does not distinguish *Haskell* v. *Kaman Corp.*, 743 F.2d 113 (2d Cir. 1984); *Pace* v. *Southern Ry. Sys.*, 701 F.2d 1383 (11th Cir.), *cert. denied*, 464 U.S. 1018 (1983); *EEOC* v. *American Nat'l Bank*, 652 F.2d 1176 (4th Cir. 1981), *cert. denied*, 459 U.S. 923 (1982); or *Turner* v. *Texas Instruments, Inc.*, 555 F.2d 1251 (5th Cir. 1977).

[4] Respondent points to *Bradbury* v. *Phillips Petroleum Co.*, 815 F.2d 1356 (10th Cir. 1987), and *Perricone* v. *Success Motivation Inst., Inc.*, 10 Fed. R. Evid. Serv. 938, 942 (S.D.N.Y. 1982), to support his argument that complaints are not hearsay. These cases do not clearly support that proposition. However, to the extent that they do, they merely prove that the conflict is widespread and confirm the recurring nature of the issue and the compelling need for review by this Court.

[5] Rule 404(b) states that "evidence of other wrongs or acts . . . may . . . be admissible [to prove] motive [or] intent."

missible *solely* at the discretion of the trial court. To the contrary, they are admissible *only* if they are competent evidence—*i.e.*, only if they are relevant and not hearsay. See Fed. R. Evid. 402 ("Evidence which is not relevant *is not admissible*") (emphasis added); Fed. R. Evid. 802 ("Hearsay *is not admissible* except as provided by these rules . . .").[6]

* * * *

In sum, respondent has not and cannot distinguish the decisions of this Court and numerous courts of appeals that squarely conflict with the holding below. Accordingly, this case presents a conflict on an important question of federal law that warrants review and reversal by this Court.

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[6] The cases cited by respondent in support of his argument, Opp. 12-13, stand only for the entirely unremarkable proposition that under appropriate circumstances, evidence of prior bad acts *may* be admissible. *Bradbury* v. *Phillips Petroleum Co.*, 815 F.2d 1356 (10th Cir. 1987), for example, stands only for the proposition that evidence of strikingly similar bad acts is admissible to prove the absence of mistake or accident. Similarly, *Harpring* v. *Continental Oil Co.*, 628 F.2d 406 (5th Cir. 1980), *cert. denied*, 454 U.S. 819 (1981), stands only for the proposition that direct testimony by similarly situated employees is admissible to prove a pattern and practice of discrimination.

CONCLUSION

For the foregoing reasons and for those stated in the petition, the petition for a writ of certiorari should be granted. Because of the inconsistency between the ruling below and this Court's decisions in *Mayor of Philadelphia* and *Teamsters*, the Court may wish to consider reversing the judgment summarily.

Respectfully submitted,

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